TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 68

R. H. DAVIS, TRADING AS DAVIS MOTOR SALES, PETITIONER,

vs.

AETNA ACCEPTANCE COMPANY.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, FIRST DISTRICT.

PETITION FOR CERTIORARI FILED MAY 26, 1934.

CERTIORARI GRANTED OCTOBER 8, 1934.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, FEBRUARY TERM, A. D. 1933

ÆTNA ACCEPTANCE COMPANY, a Corporation, Defendant in Error,

vs.

R. H. DAVIS, Trading as DAVIS MOTOR SALES, Plaintiff in Error

Error to Circuit Court, Cook County

Honorable C. A. Hood, Judge Presiding

ABSTRACT OF RECORD

Placita.

Affidavit for replevin.

Replevin writ.

Order granting leave to plaintiff to withdraw replevin bond.

Declaration in replevin, consisting of three counts; count 1, for the unlawful taking of one Auburn Sport Sedan; and counts 2 and 3, for the unlawful detaining of said Auburn Sport Sedan.

Alias replevin writ.

Appearance of R. H. Davis, defendant.

Plea of the general issue, of the defendant.

Count in trover filed on December 24, 1929, alleging that the plaintiff was possessed of one Auburn Sport Sedan, of the value of $1,000; that it lost the same; that the defendant found it; that on request of the plaintiff the de-

[fol. 2] fendant refused to deliver the same to the plaintiff, but has wilfully, wrongfully, tortiously and maliciously converted the same; to the damage of the plaintiff in the sum of $1,000 and 5% interest thereon.

Order of December 24, 1929, granting leave to plaintiff to file additional counts to declaration instanter, and rule on defendant to plead in ten days.

Alias replevin bond.

Plea of the defendant of the general issue to the count in trover.

Special plea to the count in trover, setting forth, that after the happening of the grievances complained of in the declaration, on June 9, 1930, the District Court of the United States of America, for the Northern District of Illinois, entered an order setting forth, that whereas, Robert H. Davis, trading as Davis Motor Sales, was duly adjudicated a bankrupt under the Acts of Congress relating to bankruptcy, and that he complied with all the requirements of law relating thereto, that thereupon he was discharged from all debts and claims provable by said Acts against his estate, existing on the 13th of September, 1929, except such as were exempt from the operation of the discharge; that the above cause of action consisted of debts and claims provable against said estate under the Acts of Congress, and existed on the 13th of September, 1929, and that the supposed cause of action of the plaintiff is not exempt from the operation of said discharge.

June 17, 1930, order granting leave to defendant to file pleas instanter.

Replications of plaintiff to pleas of defendant, joining issue with the plea of the general issue of the defendant, and setting forth that the debt upon which the cause of action [fol. 3] of the plaintiff is predicated, is the wilful and malicious injury by the defendant to the property of the plaintiff, and created by fraud, misappropriation, embezzlement or defalcation of the defendant while acting in a fiduciary capacity; that the plaintiff on July 10, 1929 was the owner of an Auburn Sport Sedan, and on that day delivered it to the defendant under a series of documents known as a "floor plan" arrangement, providing that the title was retained in the plaintiff until the full sum of $1,181.87 should be paid by the defendant to the plaintiff; that the automobile should continue in the possession of the defendant until released from the floor plan arrangement, or removed by the plaintiff, and that said property should be returned to the plaintiff on demand; that the plaintiff should not sell, loan, rent, deliver, mortgage, pledge or otherwise dispose of the property, except on written order from the plaintiff releasing the same upon payment to plaintiff of the amount stipulated in the agreement; that notwithstanding said written agreements, the defendant, without the knowledge or consent of the plaintiff, without obtaining any release, and without paying the above sum of money, and in violation of the defendant's duties as

bailee and trustee, some time subsequent to July 10, 1929 sold, disposed of, and converted the property to his own use, and the proceeds of the sale thereof, with the intent, and for the purpose of wilfully and maliciously injuring the plaintiff in said property and has failed to return said car notwithstanding repeated demands for said car have been made on the defendant by the plaintiff.

Order granting leave to plaintiff to file replication instanter.

[fol. 4] Order granting leave to Ramlose & Edwards to enter their appearance for defendant, in lieu of A. L. Schapiro.

Notice to place cause on trial calendar.

Amendment to count in trover filed October 8, 1931, by inserting $2,000 in lieu of $1,000 on the first page thereof as the value of the car also $2,500 in lieu of $1,000 on the second page thereof as the damages suffered, and increasing the *ad damnum* to $3,000.

Order that plaintiff be given leave to amend *ad damnum* and count in trover instanter, and rule on defendant to plead to count as amended within five days.

Order of November 14, 1931, dismissing suit as to John Doe, trial *ex parte* by court finding defendant guilty, and assessing plaintiff's damages at the sum of $1,441, judgment on the finding.

Order of November 18, 1931 vacating judgment entered on November 16, 1931, and cause reinstated on trial calendar.

Petition to vacate judgment entered November 16, 1931.

Appearance of Goldman, Allshouse & Healy as associate counsel for defendant.

Finding by court that the defendant, Robert H. Davis was guilty of legal conversion of the property as described in the count in trover.

Finding by Court that the defendant was not actuated by any wilful, malicious, or criminal intent in disposing of the car in question.

Trial by Court, finding the defendant guilty, and the right of possession to the property in the plaintiff, and [fol. 5] assessing the plaintiff's damages at the sum of $1,000.

Motion for new trial; motion overruled and exception by defendant.

Motion in arrest of judgment; motion overruled and exception by defendant.

Judgment that the plaintiff have and retain the property replevined by virtue of the writ of replevin herein, and also recover the sum of $1,000 for its damages and costs.

Appeal prayed by the defendant to the Appellate Court, First District of Illinois; appeal allowed; defendant granted sixty days to file bill of exceptions.

Motion to vacate judgment entered on May 12, 1932.

Motion to vacate judgment by the defendant overruled, to which defendant excepts. Time for filing appeal bond and bill of exceptions extended an additional thirty days.

Defendant's bill of exceptions presented for approval July 6, 1932.

Bill of exceptions.

Stipulation by the parties that the value of the car in question was $1,181.87; that the car was sold prior to the time that the defendant went into bankruptcy, which was about September 10, 1929, in the regular course of business, by a salesman of the defendant; that there was no concealment of the sale, and that the defendant was paid for the car.

[fol. 6] HARRY A. COLLINGER, witness for the plaintiff, testified as follows:

Direct examination:

My name is Harry A. Collinger. I live at 4564 Monticello avenue and an employed by the Ætna Acceptance Company; have been employed five and one-half years. I have general supervision of practically the whole business and am acquainted with the floor plan arrangement, whereby a dealer who has not enough money to pay for an automobile, advances ten per cent. The company advanced $1,181.87 on this car, and that was nienty per cent. $1,181.87 was turned over to the factory. The first papers were not paid and the defendant renewed notes. After the first transaction, where a check and certain papers passed, thirty days elapsed. At the end of thirty days the original note was paid by giving renewal papers therefor. This is defendant's signature to Plaintiff's Exhibit 1. It was executed on the date it bears. The amount of Plaintiff's Exhibit 1 has not been paid. I talked to Davis over the

telephone. One of our men had been to his store and came back with the report that this car was gone, so I immediately called Davis to find out what the situation was. I told him I had a report that the car was off the floor. He said he knew that but he would take care of the account within the next few days. I do not recall just how many conversations I had with Davis because I probably would call him four, five, six and eight times a week. All I would talk to Davis about would be about the account. The automobile has never been returned by Davis.

[fol. 7] The check and the contract have different dates because it was a renewal of the original instrument. The amount did not include finance charges. We are supposed to get one per cent per month. The original amount was $1,181.87, so at the end of the month we did not put in any interest in the new deal. When we advanced ninety per cent we did not figure in the interest. The interest item is paid ordinarily either at the end or the beginning of the period for which the note is taken. We advanced money to Davis on other deals before that time. We started to do business with Davis the early part of 1929. It may have been December, 1928, and continued until the date of this action. There must have been at least forty retail transactions with Davis. We had about twenty-eight wholesale transactions, more or less. This is a wholesale transaction involved here. All of the wholesale transactions were paid in the regular course of business. This deal was due and payable in sixty days. On the prior wholesale deals the release was the instrument, it was marked paid. I do not know, in these other wholesale transactions with Davis whether Davis would sell the car and then pay the bill. No formal, technical release was ever passed between the company and Davis in any of the transactions.

Redirect examination:

On the 10th day of August our company repossessed two automobiles. They are the other two of this deal. When I say paid I had in mind that we took the cars back.

[fol. 8] When we took the cars back I gave instructions to leave the instruments marked 1 and 2 for identification there. R. R. Wilson is the president of the company and Mr. Heater is the secretary. He still is secretary. Mr. McKernan went out there and took those papers. That is

McKernan's signature on Defendant's Exhibit 3 for identification. That was between the 5th and 10th of August, 1929. Davis went into bankruptcy about the 13th of September. On about August 14th we received the letter marked Defendant's Exhibit 4 for identification.

JOHN M. MCKERNAN, witness for the plaintiff, testified as follows:

Direct examination:

My name is John McKernan. I live at 5893 North Kilbourn avenue, Chicago. I know Mr. Davis, have known him three years. I solicited Davis' business for the Ætna Acceptance Company, handling the floor plan of checking cars. I called on Davis once a week for eight or nine months, from December, 1928 until August, 1929. At 600 West Madison street, Oak Park. I solicited his business on behalf of Ætna Acceptance Company, taking care of his wholesale, and checking it. I have seen Plaintiff's Exhibit 1 before. That is a floor plan. I saw the car described in this Exhibit 1. On Mr. Davis' show room floor. In June, 1929. I checked that car because we had a floor plan on it. I found that the numbers on it tallied with the wholesale mortgage. I checked it weekly. The last time I checked [fol. 9] it was around July 10th, 11th, 12th—it was the last time I saw the car. I went back every week end to check it. Next to the last time I checked it a week later. I found the car in his showroom. Around July 25th was the last time I saw it. I went back on my tour of inspection. The car was not there. I spoke to Davis about it. He said he had sold the car, or it was out on approval, he would send a check as soon as he got around to it. I reported it. I had no other conversation with Davis. I have not seen the car from that day to this. I reported it to Collinger.

Cross-examination:

The last time was the 25th of July, 1929. I said I would like to get it cleaned up or a check as quick as possible. I asked for the money. The balance in full. I did not call after July 25th about the car. After the 25th I called on Davis, about the 7th or 8th of August. That is when I discovered the car was gone. I was not the man who took the

other cars on the 10th of August. That is my signature on Defendant's Exhibit 3 for identification. I gave Mr. Davis that instrument.

Plaintiff's Exhibits 1 and 2 offered and received in evidence, which are as follows:

Plaintiff's Exhibit 1 is a chattel mortgage executed by Davis Motor Sales to Ætna Acceptance Company, covering an Auburn sport sedan, serial number 2976808, motor number 25943, to secure the payment of $1,181.87, dated July 10, 1929. Attached to the mortgage is a note of even date for $1,181.87, payable to the order of Ætna Acceptance Company sixty days after date. Also attached is a trust receipt of even date signed by Davis Motor Sales acknowledging receipt of the above automobile and agreeing [fol. 10] to hold the above property as the property of the Ætna Acceptance Company for the purpose of storing the same, and agreeing to keep the property new and not to operate for demonstration or otherwise, and to return the property to the Ætna Acceptance Company on demand; agreeing also not to sell, loan, rent, deliver, mortgage, pledge or otherwise dispose of said property to any other person, except upon written order from said company for release from trust upon payment to the company of amount required by the order, upon the endorsement on the back of this trust receipt of a release from trust. Attached to the above is a bill of sale dated July 19, 1929, executed by Davis Motor Sales to Ætna Acceptance Company, conveying automobile in question.

Plaintiff's Exhibit 2 is a check dated June 10, 1929, executed by Ætna Acceptance Company, made payable to the order of Davis Motor Sales for $1,181.87, drawn on the Fidelity Trust and Savings Bank.

Thereupon the plaintiff rested.

R. H. Davis, witness for the defendant, testified as follows:

Direct examination:

My name is R. H. Davis. I live at 603 Wesley avenue, Oak Park. In 1929 I was in the automobile business. I was in that business two or three years, selling cars at retail to the public. I had a sales room floor and retailed them in

the ordinary course of business. I had business transactions with the Ætna Acceptance Company, the plaintiff. They began in 1928 and ceased September 3, 1929. I had [fol. 11] wholesale transactions. They financed cars on my sales room floor. I sold them at retail on conditional sales contract. I financed approximately 28 to 35 wholesale cars through the Ætna Acceptance Company. I never got a written release of these cars from the Ætna Acceptance Company. I had about fifty retail transactions. When McKernan came to solicit my business there was something said at that time about rebates on deals. That was about November 28, 1928. My bookkeeper was present when McKernan came in. His name is Mr. Sheid. He said that on every used car deal I turned into the Ætna Acceptance Company I would receive $6.00. On every new car deal I turned in I would receive $12. McKernan said that that was a rebate. I sold the car in question on August 3, 1929 through my salesman, Panter. It was on my books and the salesman's commission was paid. It was sold in the regular course of business. There was no concealment about it. After the car was sold I had a conversation with Mr. Heater of the Ætna Acceptance Company. He was secretary of the company. The conversation was with respect to this car. The afternoon when I sold this car I called Mr. Heater and told him I had sold the automobile and that I would like a statement from him as to the money due on a judgment they were getting on a Goodyear deal which amounted to $382, and rebate money on previous deals, and unless they would furnish me with a statement I was going to floor-plan my cars through another finance company. He said he would do it and it would not be necessary to floor-plan them through any other house, but I never received any statement. I had no other conversation with Heater on the night of August 10th. I was out of my place of business on August 10th. Before I left the place [fol. 12] the two Auburn automobiles financed by the Ætna Acceptance Company were there. When I returned they were not there. I found these papers there and I had a talk with Heater about the papers and the automobile. I refer to Defendant's Exhibits 1 and 2 when I talk about these papers. I told Heater that they had taken the two cars off my floor and I would like a statement in full for the money due on the other two transactions, such as rebate money and the money due me on the Goodyear deal and

also ten per cent on the two cars they had taken off the floor, and if they would give me a statement I would give them a check in turn for what I owed them. McKernan's signature appears on Defendant's Exhibit 3. The Goodyear judgment is the one referred to in Defendant's Exhibit 3. I never received any money on that judgment. Heater told me that I should call or go down and see Mr. Kleinman on the 10th of August. The same day I found these papers. I was told to see Mr. Kleinman and I would get the money on this particular judgment. Kleinman referred me to Heater and it seemed I could not get any money from either of them. On July 8, 1929 I saw McKernan. He left this document with me. On July 10th I told the secretary that they owed me money. I told him they owed me $161 in rebate money, $352, the ten per cent in the car, and $382 on the judgment. He said we could get together on it. I told him I would tender him the balance. I did not tender the balance and I never received a statement from them. I did not know what was coming to me for the simple reason I was to receive half the judgment they were collecting from Goodyear. I knew two of the items. When McKernan left the paper he said $498 was half the judgment. The real amount of the judgment [fol. 13] was over $700. I told him (the secretary) the correct amount of my half was 300 some odd dollars. I did not tell the secretary over the telephone I had 300 some odd dollars coming on the judgment. On the 10th I was down to their office. Defendant's Exhibit 4 is in my handwriting. (Mr. Kleinman admits having received it.) I never received any money at all. I was down to Kleinman to see about the Goodyear judgment prior to this deal. Kleinman referred me to Heater. Heater referred me to Kleinman. I first talked to Kleinman about June 8th. Goodyear judgment was one of the deals that was financed by the Ætna Acceptance Company. It was a retail deal with recourse. I accepted the deal and Mr. Goodyear needed a signature on it and his mother and sister signed the deal. Several months later he fell down on the payments and left the car out and reported it stolen. Nevertheless, the deal fell back and there was a judgment entered against Mr. Goodyear. In the meantime I paid it. I think I was entitled to the whole judgment but I was told I was to receive half. There is money coming to me for at least half of the judgment, that is $382 and $200 for rebate. All

these things happened before I went into bankruptcy. I reported these matters to my attorney when I filed my petition in bankruptcy. The items were scheduled there but the amounts I do not remember. I never got this. The bankrupt court never got them, nor the trustee, nor receiver acting for me.

Agreement by the parties that no formal releases were ever given in any prior transaction. Statement by Mr. Healy on question of the Court.

These two items of assets were scheduled by deducting what the Ætna Company owed Davis from what Davis [fol. 14] owed the company, which left a balance of about $50 owing from Davis to the Ætna Company.

Thereupon the defendant offered bankruptcy schedules A and B, which were received in evidence marked Defendant's Exhibit 5, which is in words and figures as follows:

Defendant's Exhibit 5 consists of Schedules A-3 and A-4. A-3 sets forth the Ætna Acceptance Company as a creditor for merchandise to the extent of $50. Schedule A-4 shows liability of Davis to the Ætna Acceptance Company as endorser on four notes for the amounts as follows: $253.80, $1,392, $298.20 and $343.20.

Defendant's Exhibits 1, 2, 3, 4, 6 and 7, offered and received in evidence, are as follows:

Defendant's Exhibit 1 is a notice dated August 10, 1929, certifying that the American Foreclosure Company was authorized by Ætna Acceptance Company to take possession of an Auburn 120 cabriolet, serial number 25713, motor 2953713, covered by chattel mortgage or conditional sales contract by reason of default under the mortgage or contract. Signed American Foreclosure Company, by G. Patch. Also receipt for the above car in good order the 10th day of August, 1929, signed G. A. Patch.

Defendant's Exhibit 2 is a notice dated August 10, 1929, certifying that the American Foreclosure Company was authorized by Ætna Acceptance Company to take possession of an Auburn 8-90 Sedan, serial number 2974243, motor number 21892.

Defendant's Exhibit 3 is a letter written by Ætna Acceptance Company by J. McKernan to R. H. Davis Motor [fol. 15] Sales on June 8, 1929, advising that judgment had been taken against Goodyear in the amount of $498.40; that the property was up for sale; also that Goodyear's attorney was talking settlement; and that when settlement

was made Davis would receive one-half of the amount collected. Attached to the letter is a Statement of Sale of the Goodyear car, showing the total indebtedness to be $698.40 and a credit on account of the car sold for $200, leaving a deficiency of $498.40.

Defendant's Exhibit 4 is a letter written by Davis Motor Sales to the Ætna Acceptance Company on August 14, 1929, stating that in his absence two cars were removed from his floor and that it was entirely uncalled for, as it was his understanding that the cars were to be sold and checks forwarded for the amounts due; that he had decided that he did not care to have further dealings with the Company and requested an itemized statement of the moneys claimed to be due by the Ætna Acceptance Company, and that he would submit the same to his attorneys, together with an itemized statement of the amount he claimed the Ætna Company owed him, with instructions to his attorney to send to the Ætna Company a check for the moneys owing to that Company and a demand for a check in the event the Ætna Company was indebted to him, also requesting an itemized statement of the moneys claimed by the Company, including credits due him on reserves and other deals.

Defendant's Exhibit 6 is a certified copy of an order entered on June 9, 1932, by Charles E. Woodward, Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division, in suit 42709, dis- [fol. 16] charging Robert H. Davis, Trading as Davis Motor Sales, from all debts provable by the Acts of Congress relating to bankruptcy which existed on the 13th day of September, 1929, except such debts — are by law exempted.

Defendant's Exhibit 7 is a certified copy of the judgment entered in the suit of Ætna Acceptance Company *vs.* G. J. Goodyear, *et al.*, in the Municipal Court of Chicago, suit number 1880009, for the amount of $768.40; also a satisfaction of judgment in said suit for the above amount of money executed by William S. Kleinman, attorney for Ætna Acceptance Company.

Defendant's Exhibits 8 and 9 offered and received in evidence are as follows:

Defendant's Exhibit 8 is a conditional sales contract executed by Lucy E. Wilson as purchaser and Davis Motor Sales as sellers of an Auburn sedan, motor number 258587, serial number 2951032, for which car the purchaser agreed

to pay the sum of $1,162.56. Attached to the contract is a note executed by Lucy E. Wilson for the above amount of money dated of even date with the contract, made payable to Davis Motor Sales at the office of the Ætna Acceptance Company and endorsed without recourse to the Ætna Acceptance Company, which contract and note are stamped paid February, 1930.

Defendant's Exhibit 9 is a chattel mortgage executed by Davis Motor Sales as mortgagor on February 13, 1929, whereby it mortgaged to the Ætna Acceptance Company an Auburn sedan, serial number 2951032, motor number 25857, in consideration of $1,458.90, advanced by the latter company. Attached also is a Bill of Sale executed by Davis [fol. 17] Motor Sales to Ætna Acceptance Company on the same car and also dated February 13, 1929. There is also attached a trust receipt of even date, executed by Davis Motor Sales, acknowledging receipt of the above car from the Ætna Acceptance Company and agreeing to hold the same in trust for the Company and not to sell, loan, rent, deliver, mortgage, pledge, or otherwise dispose of the property to any other person except upon written order from the Ætna Acceptance Company for release from trust, upon payment to the Company of the amount required by said order, and upon the endorsement on the back of the trust receipt of a release. There is also attached a note executed by Davis Motor Sales of even date for $1,458.90, made payable to the order of Ætna Acceptance Company thirty days after date. All of these instruments are stamped paid March 12, 1929.

The Witness: I kept a record of these rebates and figured the amount from the record. I tried to get the books from the receiver in bankruptcy and he said that they had been destroyed. While the books were in my possession and negotiations were going on, my bookkeeper made a record of the rebates and took a list off the books, which is marked Defendant's Exhibit 10 (for identification). It is in my bookkeeper's handwriting. I remember the deals. I remember Gust Olson deal. I recall these deals entitled to rebate. I collected rebates on previous deals. These rebates were about a month old at the time I demanded them. I had been in the general habit of collecting rebates on all prior deals except those of that month. The rebates ran from $100 to $250 a month.

Defendant's Exhibit 10 for identification offered and received in evidence, which is a statement on the letterhead [fol. 18] of Davis Motor Sales, dated January 28, 1932, showing items as follows:

June 1	J. L. Wellenhofer	$ 29.00
June 8	Geo. A. Alm	27.00
June 14	H. S. Fomey	6.00
June 7	J. K. McDonald	12.00
June 22	C. Witting	6.00
June 24	W. Green	6.00
June 24	A. J. Flashing	12.00
June 22	R. W. Maguire	24.00
June 29	F. H. Ducil	12.00
July 19	P. C. Weeg	27.00
		$161.00
June and July		291.10
127.10		$452.10
164.00, Mr. Goodyear		498.40
291.10		$950.50

Cross-examination.

We kept a complete set of books in our business showing the type of cars sold, who sold them, dates of sale, the price, profit, and the purchase price, also the finance company. Most of the cars were sold on time deals. I kept a complete bookkeeping system and reported every transaction I had with the Ætna Company and by simple computation I could have figured the amounts of the rebates to which I was entitled at any given date.

Defendant's Exhibits 11 to 16 inclusive were received in evidence and are as follows:

Defendant's Exhibit 11 consists of the following documents:

A chattel mortgage executed by the Ætna Motor Sales to Ætna Acceptance Company on March 20, 1929, covering [fol. 19] an Auburn phaeton sedan, serial number 2972160, motor number 19631, securing the payment of $1,400. A chattel mortgage note of even date executed by Davis Motor Sales for $1,400, made payable to the order of the Ætna Acceptance Company. A bill of sale executed by

Davis Motor Sales to Ætna Acceptance Company to the above car, dated March 20, 1929. A trust receipt executed by Davis Motor Sales on March 20, 1929, acknowledging receipt of the above car from the Ætna Acceptance Company and agreeing to hold the same in trust for the Company and agreeing not to sell, loan, rent, deliver, mortgage, pledge or otherwise dispose of the property except upon the written order of the Ætna Acceptance Company for release from said trust, upon payment to the above Company of the sum of $1,400.

Defendant's Exhibit 12 consists of a chattel mortgage of the Davis Motor Sales on March 18, 1929, to the Ætna Acceptance Company covering an Auburn 1929 sedan, serial number 2951504, motor number 26053, to secure the payment of $1,471.50. Attached to the mortgage is a mortgage note of even date executed by the Davis Motor Sales evidencing the indebtedness of $1,471.50 due under the above mortgage. Attached is also a Bill of Sale of the Davis Motor Sales, executed on the 18th of March, 1929, to the Ætna Acceptance Company covering the above car. Attached also is a trust receipt of even date with the above instruments, executed by Davis Motor Sales, in which it acknowledges receipt of the above sedan from the Ætna Acceptance Company, agrees to hold the same in trust for the latter Company and not to sell, loan, rent, deliver, mortgage, pledge or otherwise dispose of said property [fol. 20] except upon the written order of the Ætna Acceptance Company for release from trust, upon payment of the above amount.

Defendant's Exhibit 13 is comprised of a chattel mortgage of Davis Motor Sales to the Ætna Acceptance Company covering the Auburn Victoria coupe, serial number 2971224, to secure an indebtedness of $1,131.30. Attached to it is a chattel mortgage note for the above amount executed by the Davis Motor Sales on the same day. Attached is also a Bill of Sale of the Davis Motor Sales selling the above car to the Ætna Acceptance Company. Attached is also a trust receipt of the Davis Motor Sales, dated March 26, 1929, acknowledging receipt of the above automobile from the Ætna Acceptance Company, and agreeing to hold the same in trust, and agreeing not to sell, loan, rent, encumber or dispose of the same except upon written order from the Ætna Acceptance Company and upon payment of the above amount.

Defendant's Exhibit 14 is a chattel mortgage of Davis Motor Sales dated April 13, 1929, to the Ætna Acceptance Company, covering an Auburn sedan, serial number 2951154, motor number 26143, securing the payment of the sum of $1,471.50. Attached thereto is also a chattel mortgage note for $1,471.50 of the Davis Motor Sales of even date with the chattel mortgage, made payable to the order of the Ætna Acceptance Company. Attached thereto is a Bill of Sale of Davis Motor Sales covering the above car, by which the Davis Motor Sales Company sells the same to the Ætna Acceptance Company. Attached thereto is also a trust receipt executed by the Davis Motor Sales on April 13, 1929, by which it acknowledges receipt of the above car from the Ætna Acceptance Company, agreeing [fol. 21] to hold the same in trust and not to sell, loan, rent, encumber, or dispose of the same except upon the written order of Ætna Acceptance Company and upon payment of the above amount of money and release of said property from said trust.

Defendant's Exhibit 15 is a chattel mortgage executed by the Davis Motor Sales on the 18th day of May, 1929 to the Ætna Acceptance Company covering an Auburn sport sedan, serial number 2975904, motor number 24722, securing the payment of $1,181.47. Attached thereto is a chattel mortgage note of the Davis Motor Sales evidencing the above amount. Attached thereto is a Bill of Sale of even date of the Davis Motor Sales to the Ætna Acceptance Company, whereby the above automobile was sold to the latter Company. Attached thereto is also a trust receipt of even date with the above instruments, in which the Davis Motor Sales acknowledges receipt of the above car and agrees to hold the same in trust for the Ætna Acceptance Company and not to sell, loan, encumber or otherwise dispose of the same except upon the written order of Ætna Acceptance Company to release the same from trust, and upon payment of the above amount.

Defendant's Exhibit 16 consists of a chattel mortgage of the Davis Motor Sales dated May 18, 1929, to the Ætna Acceptance Company, covering an Auburn sedan, wire wheels, serial number 2985549, motor number 11046, securing the payment of $946.35. Attached thereto is the chattel mortgage note of Davis Motor Sales, made payable to the Ætna Acceptance Company, evidencing the above amount. Attached thereto is also a Bill of Sale of the

Davis Motor Sales dated May 18, 1929, selling to the Ætna Acceptance Company the above automobile.

[fol. 22] Also, is attached a trust receipt of Davis Motor Sales acknowledging receipt of the above automobile from the Ætna Acceptance Company and agreeing to hold the same in trust and not to sell, loan, rent, deliver, encumber or dispose of the same except upon the written order of Ætna Acceptance Company to release the same from trust, and upon payment of the above amount.

Defendant's Exhibits 17, 18 and 19 were offered and received in evidence and are as follows:

Exhibit 17 is a certified copy of an order entered in the District Court of the United States for the Northern District of Illinois, Eastern Division, in the bankruptcy proceedings of Robert H. Davis, to the effect that on December 27, 1929, on notice duly filed and motion of bankrupt, an order was entered restraining Ætna Acceptance Company from prosecuting cause number B-188574 in the Circuit Court of Cook County until the further order of this Court.

Defendant's Exhibit 18 is a certified copy of an answer filed December 27, 1929, by the Ætna Acceptance Company to the petition of Robert H. Davis in the above bankruptcy proceedings, setting forth that on September 25, 1929, Ætna Acceptance Company commenced an action of replevin in the Circuit Court of Cook County against the bankrupt in suit B-188574; that demand was made on the bankrupt for the return of the property mentioned in the replevin writ; the demand was refused and thereafter the bankrupt caused his appearance and plea to be filed in said cause, whereupon a count in trover was filed by the plaintiff and rule entered on the defendant to plead; that the proceedings was for the recovery of an Auburn sedan, serial number 2976808, motor number 25943, which was entrusted to the defendant as trustee for the Ætna Acceptance Company without right ofdisposition, and that the bankrupt had [fol. 23] no interest in or title to the property except through the Ætna Acceptance Company; that the bankrupt bore a confidential relationship toward the Ætna Acceptance Company with respect to the automobile; yet the bankrupt, subsequent to the receipt of the automobile, as such trustee fraudulently embezzled and misappropriated the automobile to his own use, with the intent to deprive the Ætna Acceptance Company of it, to its damage in excess of $1,000; that the bankrupt wilfully and maliciously intended

to injure the Ætna Acceptance Company and that the obligation of the bankrupt for the automobile is not dischargeable by the bankrupt laws, and that an adjudication in the above suit in the Circuit Court could not be effected by discharge in bankruptcy, by virtue of which the Ætna Acceptance Company moved the Court to deny the bankrupt's petition for exemption. The above answer was filed December 27, 1929.

Defendant's Exhibit 19 is a certified copy of the petition filed by Robert H. Davis in the above bankruptcy proceedings on December 27, 1929, praying that the Ætna Acceptance Company be restrained from proceeding with Case B-188574 pending in the Circuit Court of Cook County, entitled Ætna Acceptance Company vs. R. H. Davis, trading as Davis Motor Sales.

Robert H. Davis, witness for the plaintiff, further testified:

Redirect examination:

Defendant's Exhibit 11 represents a transaction similar to the one in question. Those papers were signed when the car described in the exhibit was purchased by me and financed by the Ætna Acceptance Company. That is my signature to the instrument. I received that back after [fol. 24] the car had been sold, and had been paid for. When I signed the exhibit it was turned over to the Ætna Acceptance Company and I received the car from the distributor. After I paid for the transaction I received the exhibit back.

Stipulation by the attorneys that the defendant would testify similarly to Exhibits 12, 13, 14, 15 and 16.

Thereupon the defendant rested his case.

The plaintiff thereupon offered Schedule B-3 consisting of two pages and B-4 consisting of one page of the bankrupt matter of Robert H. Davis, which were received in evidence as Plaintiff's Exhibits 1 and 2, of January 31, 1932. Plaintiff's Exhibits 1 and 2 consist of a certified copy of Schedules B-3 and B-4 filed October 29, 1929, in bankruptcy number 42709 of Robert H. Davis, bankrupt which is a list of debtors. Ætna Acceptance Company does not appear in the list.

The foregoing was all of the testimony and evidence offered and received.

Thereupon the defendant presented to the Court a finding of fact to be held by the Court as a finding of fact in said cause, which Court then and there marked "Hold as a Finding of Fact in said Cause," and is in words and figures as follows:

"The Court finds that the defendant was not actuated by any wilful, malicious or criminal intent in disposing of the car in question."

Thereupon the plaintiff submitted to the Court a finding, which was also held as a finding in said cause, which is in words and figures as follows:

"The Court finds Robert H. Davis guilty of legal conversion of the property of the plaintiff as described in the court in trover heretofore filed herein."

[fol. 25] The Court: The Court finds that the defendant in this case was not actuated by any wilful, malicious or criminal intent in disposing of the car in question.

The Court: I will find the defendant guilty of conversion.

The Court thereupon found the defendant guilty and assessed the plaintiff damages in the amount of $1,000, to which finding the defendant, by his attorneys, then and there duly excepted.

Thereupon the Court entered a judgment on said finding in trover against the defendant and assessed the plaintiff damages in the sum of $1,000 and costs of suit, to the entry of which judgment the defendant, by his attorneys, then and there duly excepted.

Thereupon the defendant, by his attorney, prayed an appeal to the Appellate Court, First District of Illinois, which was allowed upon the defendant filing a bond of $1,300 within thirty days from May 12, 1932, and the defendant was granted sixty days from such date within which to file a Bill of Exceptions.

Thereupon the defendant moved the Court to vacate the judgment, because it was contrary to the finding of the Court, which motion the Court denied, to which ruling — the Court, the defendant, by his attorney, then and there duly excepted.

Thereupon the time for filing the defendant's Bill of Exceptions was extended thirty days beyond the time theretofore set for the filing of same.

Certificate of the Judge that the Bill of Exception was presented for signature on the sixth day of July, 1932.

Stipulation that original bill of exceptions may be inserted in the certified copy of the record to be filed in the Appellate Court, in lieu of a copy.

[fol. 26] Order that the bill of exceptions of the defendant be approved nunc pro tunc as of June 6, 1932, and ordered filed as of said date.

Certificate of clerk.

Assignment of Errors

Now comes R. H. Davis, doing business as Davis Motor Sales, plaintiff in error in the above entitled cause, and alleges that there is error in the records and proceedings in the above entitled cause in that:

1. The finding of the Court is contrary to the evidence.

2. The finding of the Court is contrary to the law.

3. The judgment of the Court is contrary to the evidence.

4. The judgment of the Court is contrary to the law.

5. The finding of the Court is contrary to the special finding of the Court, that the plaintiff in error was not actuated by any malicious, wilful or criminal intent in disposing of the car in question.

6. The judgment of the Court is contrary to the special finding of the Court, that the plaintiff in error was not guilty of any malicious, wilful or criminal intent in disposing of the car in question.

7. The general finding of the Court is contrary to the special finding of the Court, that the plaintiff in error was not actuated by any wilful, malicious or criminal intent in disposing of the car in question.

[fols. 27–29] 8. The trial court erred in refusing to recognize the injunctional order of the District Court of the United States, for the Northern District of Illinois, restraining the defendant in error from prosecuting this suit.

Wherefore, the plaintiff in error prays that said judgment be reversed.

Goldman, Allshouse & Healy, Ramlose & Edwards,
Attorneys for Plaintiff in Error.

[fol. 30] In Appellate Court of Illinois, First District, February Term, A. D. 1933

No. 36473

Ætna Acceptance Company, a Corporation, (Plaintiff) Defendant in Error,

vs.

R. H. Davis, Trading as Davis Motor Sales, (Defendant) Plaintiff in Error

Error to Circuit Court, Cook County

Honorable C. A. Hood, Judge Presiding

Additional Abstract of Record

Stipulation of the parties by their respective attorneys that the sum of $1,181.87 is the value of the automobile in question, that the defendant disposed of the automobile prior to the time he went into bankruptcy; that the car was sold about August 3, 1929, in the regular course of business and that the consideration for the sale of said automobile was received by Mr. Davis, the defendant herein.

The Court: • • • I will find the defendant guilty of conversion. Finding of guilty and plaintiff's damages in the amount of $1,000.

[fol. 31] Mr. Kleinman: I object to the finding as to value in view of the previous stipulation of a value of $1,181.87.

The Court: Objection overruled.

Mr. Kleinman: Exception.

Transcript of record showing the correct judgment order entered in this cause in the Circuit Court of Cook County, and filed in this court on February 17, 1933, by leave of court:

Placita.

Order entered January 14, 1933, nunc pro tunc as of May 12, 1932, showing cause submitted to the court for trial. Court heard all the evidence adduced and being fully advised in the premises finds the defendant guilty of converting the property of the plaintiff as charged in plaintiff's court in trover heretofore filed herein and assesses the plaintiff's damages at the sum of one thousand dollars ($1,000).

Motion of defendant for a new trial overruled, and exception.

Motion of defendant in arrest of judgment overruled, and exception.

Judgment on finding that the plaintiff do have and recover of and from the defendant, R. H. Davis, its damages of one thousand dollars ($1,000) in form as aforesaid by the court assessed, together with its costs and charges in this behalf expended and have execution therefor.

[fol. 32] Prayer for appeal by the defendant which is allowed upon filing his appeal bond in the penal sum of thirteen hundred dollars ($1300) to be approved by the clerk of this court within thirty (30) days; bill of exceptions within sixty (60) days.

Ordered that the above order and judgment be and the same is hereby entered herein of record nunc pro tunc as of May 12, A. D. 1932.

Exception by defendant to entry of above judgment order; ten (10) days allowed for bill of exceptions.

Certificate of clerk of the Circuit Court of Cook County.

Assignment of Cross-errors of Defendant in Error

Now comes Ætna Acceptance Company, a corporation, defendant in error, by William S. Kleinman, its attorney, and assigns cross-errors, and says that the trial court committed manifest error, as appears from the record, in this:

1. The court erred in making the finding of fact as requested by the defendant.

2. The finding of fact held by the court at the request of the defendant is contrary to the evidence and should have been refused.

3. The finding of fact made by the court at the request of the defendant is contrary to and inconsistent with the finding of fact made by the court at the request of the plaintiff.

[fols. 33 & 34] 4. The findings of facts being inconsistent to each other should be stricken and entirely disregarded.

5. The court erred in admitting into the record evidence offered on behalf of the defendant, to which repeated objections were made, but which the court received subject to objections and did not thereafter rule upon such objections. Such evidence as was objected to should now be ruled upon and stricken from the record.

6. The court erred in entering judgment for only $1,000, when it was stipulated between the parties that the value of the automobile in question is $1,181.87. The judgment should have been for $1,181.87, together with legal interest thereon at 5 per cent per annum, from August 3, 1929, which is the date of the conversion, to the date of the entry of judgment.

By reason whereof, defendant in error prays that said errors may be corrected, etc.

William S. Kleinman, Attorney for (Plaintiff) Defendant in Error.

[fols. 35 & 36] [Caption omitted]

[fols. 37 & 38] In Appellate Court of Illinois

Præcipe—Filed Dec. 6, 1932, to the February Term, A. D. 1933

State of Illinois,
Appellate Court, First District, ss:

Gen. No. 36473

Ætna Acceptance Company, a Corporation (Plaintiff), Defendant in Error,

vs.

R. H. Davis, Doing Business as Davis Motor Sales, (Defendant) Plaintiff in Error

Error to the Circuit Court of Cook County

Nisi Prius Gen. No. B. 188574.
Nisi Prius Judge: Craig Hood.

The Clerk will please issue a Writ of Error in the above entitled cause, directed to the Clerk of the Circuit Court

of Cook County. Also, issue a Writ of Scire Facias to the Sheriff of Cook County, commanding him to summon the said Defendant in Error, as provided by law.

This was an action of replevin in the Circuit Court of Cook County, Illinois, wherein judgment was rendered on the 12th day of May, A. D. 1932, and at the April Term of said Circuit Court, on the law side thereof in favor of Ætna Acceptance Company, a Corporation, and against R. G. Davis, doing business as Davis Motor Sales, for One Thousand Dollars, besides costs of suit.

Goldman, Allshouse & Healy, Ramlose & Edwards,
Attorneys for R. H. Davis, Doing Business as
Davis Motor Sales, Plaintiff in Error.

To Sheldon W. Govier, Clerk of the Appellate Court, First District, Illinois.

[fols. 39 & 40] In Appellate Court of Illinois

State of Illinois,
Appellate Court of the First District, ss:

The People of the State of Illinois to the Clerk of the Circuit Court for the County of Cook, Greeting:

Writ of Error—Filed Dec. 6, 1932

Because, in the Record and proceedings, as also in the rendition of the Judgment of a plea which was in the Circuit Court of —— County, before the Judge thereof, between Ætna Acceptance Company, a Corporation, plaintiff, and R. H. Davis, doing business as Davis Motor Sales, defendant, it is said manifest Error hath intervened, to the injury of the aforesaid R. H. Davis, doing business as Davis Motor Sales as we are informed by his complaint, and we being willing that Error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Appellate Court the Records and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Chicago, in the County of Cook, on or before twenty days before the first

Tuesday of February, 1933 next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the Error, what of right ought to be done according to law.

Witness, the Hon. William H. McSurely, Presiding Justice of our Court and the seal thereof, at Chicago, this 6th day of December in the year of our Lord one thousand nine hundred and Thirty-two.

Sheldon W. Govier, Clerk of the Appellate Court of the First District. (Seal.)

[fols. 41 & 42] In Appellate Court of Illinois

State of Illinois,
Appellate Court, First District, ss:

Writ of Scire Facias—Dec. 6, 1932

The People of the State of Illinois, to the Sheriff of Cook County, Greeting:

Because in the record and proceedings, as also in the rendition of the Judgment of a plea which was in the Circuit Court of Cook County before the judge thereof, between Ætna Acceptance Company, a Corporation, plaintiff, and R. H. Davis, doing business as Davis Motor Sales, defendant, it is said manifest Error hath intervened, to the injury of the said R. H. Davis, doing business as Davis Motor Sales as we are informed by his complaint, the record and proceedings of which said judgment we have ordered to be brought into our Appellate Court of the First District, State of Illinois, at Chicago, before the Justices thereof, to correct the errors in the same in due form and manner, according to law.

Therefore, we command you, That by good and lawful men of your county, you give notice to the said Ætna Acceptance Company, a Corporation, that it be and appear before the Justices of our said Appellate Court, at the next term of said Court, to be holden at Chicago, in said State, on the first Tuesday in February A. D. 1933, to hear the record and proceedings aforesaid, and the errors assigned if it shall see fit, and further to do and receive what said Court shall order in this behalf, and have you then and

there the names of those by whom you shall give the said Ætna Acceptance Company, a Corporation, notice, together with this writ.

Witness, Hon. William H. McSurely, Presiding Justice of our Court and the seal thereof, at Chicago, this 6th day of December in the year of our Lord one thousand nine hundred and Thirty-two.

Sheldon W. Govier, Clerk of the Appellate Court of the First District, Illinois. (Seal.)

[Endorsed:] Pd. 2.50. M .60. State of Illinois, Cook County, ss. Served this writ on the within named Ætna Acceptance Company, a Corporation by delivering a copy thereof to H. A. Callings, Manager & Agent of said Corporation this 16th day of December 1932. The President of said Corporation not found in my County. William D. Meyering, Sheriff, by James H. Frawley, Deputy.

[fol. 43] IN APPELLATE COURT OF ILLINOIS

ORDER ASSIGNING CAUSE—Dec. 6, 1932

On the Court's own motion it is ordered that the following numbered cases on the December Term Calendar, A. D. 1932 of said Court be and the same are hereby assigned to the Third Division Appellate Court for hearing and determination, to-wit: 36473: Ætna Acceptance Co., a Corp., vs. R. H. Davis etc. et al.

[fol. 44] IN APPELLATE COURT OF ILLINOIS

No. 36473

ÆTNA ACCEPTANCE COMPANY, a Corporation, Defendant in Error,

vs.

R. H. DAVIS, etc., Plaintiff in Error

Error to Cook Circuit

ORDER MAKING WRIT OF ERROR A SUPERSEDEAS—Dec. 9, 1932

This day came Plaintiff in Error by Goldman, Allshouse & Healy, his Counsel, and moved the Court to make the

writ of error issued in the above entitled cause a supersedeas; and the Court, having examined the Record, Abstracts and Briefs filed herein, and being now fully advised in the premises, doth order that upon the said Plaintiff in Error entering into a Supersedeas Bond, conditioned according to law, in the penal sum of Fifteen Hundred Dollars, with Grace Davis and Robert R. Davis as sureties thereto, said Writ of Error be made a supersedeas; whereupon counsel for said Plaintiff in Error presented his certain Supersedeas Bond in compliance with order aforesaid, it is therefore ordered by the Court that the writ of error issued herein be and the same is hereby made a supersedeas, and as such is to be obeyed by all concerned.

[fols. 45 & 46] In Appellate Court of Illinois, First District

[Title omitted]

Appearance of Defendant—Filed Jan. 6, 1933

I hereby enter the appearance of Ætna Acceptance Company, a Corporation, Defendant in error, and myself as its attorney herein.

William S. Kleinman, Attorney for Ætna Acceptance Company, a Corporation, Defendant in Error.

Dated this 6th day of January A. D. 1932.

[fol. 47] In Appellate Court of Illinois

[Title omitted]

Order Denying Motion to Dismiss—Feb. 10, 1933

The Court having considered the motion of Defendant in Error to strike the complete transcript of record heretofore filed herein in said cause by Plaintiff in Error from the files of this Court and to dismiss the Writ of Error issued herein in said cause as per suggestions and affidavit filed herein, and having also considered the counter-suggestions of the Plaintiff in Error to said motion, and being

now fully advised in the premises doth order that said motion be and the same is hereby denied.

[fol. 48] IN APPELLATE COURT OF ILLINOIS

[Title omitted]

ORDER ALLOWING MOTION SUGGESTING A DIMINUTION OF RECORD, ETC.—Feb. 17, 1933

The Court having considered the motion of Defendant in error suggesting a dimunition of the Transcript of Record heretofore filed herein in said cause and for leave to file a Supplemental Record herein instanter as per suggestions filed herein. And being now fully advised in the premises doth order that said motion be and the same is hereby allowed.

The Court having also considered the motion of Defendant in error to extend the time 90 days from February 17th, A. D. 1933 in which to file an Assignment of Cross Errors, Briefs and additional abstracts in said cause as per suggestions filed herein. And being now fully advised in the premises doth order that said time be and the same is hereby extended 60 days from February 17th, A. D. 1933.

[fol. 49] IN APPELLATE COURT OF ILLINOIS

[Title omitted]

ORDER OF SUBMISSION—March 15, 1933

This cause having this day been reached in the call of the docket, and counsel desiring to argue the same, and the Court, not being fully advised in the premises, doth order that said cause be taken under advisement on abstracts and briefs filed by Plaintiff in error and assignment of cross errors, brief and additional abstract of Defendant in error to be filed by April 18, 1933.

[fol. 50] IN APPELLATE COURT OF ILLINOIS

[Title omitted]

ORDER ALLOWING MOTION FOR LEAVE TO FILE AN ASSIGNMENT OF CROSS-ERRORS, ETC.—April 21, 1933

The Court having considered the motion of Defendant in error for leave to file an Assignment of cross Errors, briefs and additional abstracts in said cause 15 days from April 18th, A. D. 1933 as per suggestions and affidavit filed herein. And being now fully advised in the premises doth order that said motion be and the same is hereby allowed.

[fol. 51] IN APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

No. 36473

ÆTNA ACCEPTANCE COMPANY, a Corporation, Defendant in Error,

vs.

R. H. DAVIS, Doing Business as DAVIS MOTOR SALES, Plaintiff in Error

Error to Cook Circuit

JUDGMENT—Feb. 7, 1934

On this day came again the said parties, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the Judgment aforesaid is there anything erroneous, vicious, or defective; and that in the record this is no error: Therefore, it is considered by the Court that the Judgment aforesaid, be Affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error. And it is further considered by the Court that the said Defendant in error recover of and from the

said Plaintiff in error its costs, by it in this behalf expended, to be taxed, and that it have execution therefor.

And afterwards on the 17th day of February A. D. 1934, there was filed in the office of the Clerk of said Court a certain petition for rehearing in said cause.

[fol. 52] IN APPELLATE COURT OF ILLINOIS

[Title omitted]

ORDER DENYING REHEARING—Feb. 26, 1934

The Court having considered the petition of Plaintiff in error praying for a rehearing in said cause, and being now fully advised in the premises, doth order that the prayer of said petition be and the same is hereby denied.

And afterwards on the 6th day of March A. D. 1934, there was filed in the office of the Clerk of said Court a certain petition by Plaintiff in Error for a certificate of Importance and an Appeal to the Supreme Court of Illinois in said cause.

[fol. 53] IN APPELLATE COURT OF ILLINOIS

[Title omitted]

ORDER DENYING MOTION FOR CERTIFICATE OF IMPORTANCE, ETC.—March 7, 1934

The Court having considered the motion of Plaintiff in error for a Certificate of Importance and an Appeal to the Supreme Court of Illinois in said cause or in the event said Certificate of Importance is denied that the issuance of the mandate in said cause be stayed pending the disposition of a petition for a Writ of Certiorari in the Supreme Court of the United States as per petition filed herein,

And being now fully advised in the premises doth order that said motion be and the same is hereby denied.

[fols. 54 & 55] In Appellate Court of Illinois

[Title omitted]

Order Allowing Motion for Stay of Mandate—March 9, 1934

On the Court's own motion, It is ordered that that part of the order of March 7th A. D. 1934 denying Plaintiff's in Error motion to stay mandate pending the disposition of a petition for a Writ of Certiorari in the Supreme Court of the United States be and the same is hereby vacated and set aside, and the Court upon reconsideration of said motion doth order that Plaintiff's in Error motion to stay mandate pending the disposition of a petition for a Writ of Certiorari in the Supreme Court of the United States be and the same is hereby allowed.

[fol. 56] In Appellate Court of Illinois

36473

Ætna Acceptance Company, a Corporation, Defendant in Error,

v.

R. H. Davis, Trading as Davis Motor Sales, Plaintiff in Error

Error to Circuit Court, Cook County

Opinion—Filed Feb. 7, 1934

Mr. Presiding Justice Hall delivering the opinion of the Court:

This is an appeal from a judgment of the Circuit Court of Cook County against defendant for the sum of $1,000.00 entered in an action in trover, brought by plaintiff to recover the value of an automobile, which it is alleged defendant wrongfully converted. The trial was by the court without a jury.

To the declaration filed in the case, defendant filed a plea of the general issue and a special plea alleging his dis-

charge in bankruptcy. To these pleas, plaintiff filed replications, in which it is alleged that the cause of action by plaintiff is predicated upon the charge of wilful and malicious injury to the plaintiff, and that the claim was created by fraud, misappropriation and embezzlement; that the plaintiff on July 10th, 1929, was the owner of an Auburn Sport Sedan, and on that day delivered it to the defendant under a series of documents known as a "floor plan" arrangement, providing that the title was retained in the plaintiff until the full sum of $1,181.87 should be paid by the defendant to the plaintiff; that the automobile should continue in the possession of the defendant until released from the floor plan arrangement, or removed by the plaintiff, and that said property should be returned to the plaintiff on demand; that the plaintiff should not sell, loan, rent, deliver, mortgage, pledge or otherwise dispose of the prop- [fol. 57] erty, except on written order from the plaintiff releasing the same upon payment to plaintiff of the amount stipulated in the agreement; that notwithstanding said written agreements, the defendant, without the knowledge or consent of the plaintiff, without obtaining any release, and without paying the above sum of money, and in violation of the defendant's duties as bailee and trustee, some time subsequent to July 10th, 1929, sold, disposed of, and converted the property to his own use, and the proceeds of the sale thereof.

The defendant was in the business of dealing in automobiles in Oak Park under the name of Davis Motor Sales, and plaintiff was in the business of financing automobile dealers. On July 10th, 1929, defendant, as Davis Motor Sales by R. H. Davis, executed and delivered to plaintiff a chattel mortgage on an Auburn Sport Sedan, serial No. 27974808, motor No. 25943, to secure the payment on a note of that date for $1181.87. Also on the same date defendant gave to plaintiff what is referred to in the abstract as a trust receipt signed "Davis Motor Sales, by R. H. Davis," by which the receipt of the automobile described is acknowledged and by which the maker agreed to hold the automobile as the property of the Ætna Acceptance Company, for the purpose of storing the same, and agreed to keep it new and not to operate it for demonstration or otherwise, and to return the property to the Ætna Acceptance Company on demand. Also, by the terms of this agreement, it is agreed that the maker would not sell, loan, rent, de-

liver, mortgage, pledge or otherwise dispose of the automobile to any other person except upon the written order from the Ætna Acceptance Company for release from trust, upon payment to the company of the amount required by the order upon the endorsement on the back of this so-called trust receipt of a release from the trust alleged to have been created thereby. Also, there was delivered at the same time to the plaintiff a bill of sale dated July 19th, 1929, executed by Davis Motor Sales, by R. H. Davis, defendant, by which the automobile in question was conveyed to the plaintiff.

[fol. 58] The trial was by the court without a jury, and after considering the evidence, the court entered the following findings:

"The Court finds that the defendant was not actuated by any wilful or criminal intent in disposing of the car in question."

"The Court finds Robert H. Davis guilty of legal conversion of the property of the plaintiff as described in the count in trover heretofore filed herein."

"The Court finds that the defendant in this case was not actuated by any wilful, malicious or criminal intent in disposing of the car in question."

"The Court finds the defendant guilty of conversion."

Thereupon the court entered judgment in trover against defendant, and in and by such judgment assessed the plaintiff damages in the sum of $1,000.00 and costs of the suit. Defendant excepted to the entry of this judgment, and from this judgment the appeal herein was prayed and allowed.

The defendant urges as grounds for reversal that the alleged conversion of the car in question was not actuated by any wilful, malicious or criminal intent; that the claim of plaintiff against defendant was provable in bankruptcy, and that defendant's discharge in bankruptcy which was proven, acted as a discharge of the claim upon which the action herein is based. It is further contended by the defendant that he had the right to sell the car in question and apply the proceeds in payment of an amount alleged to be due from plaintiff to defendant in the sum of $1,238.40.

As to whether or not there must be a showing of malice or wrongful intent upon which to predicate an action in

trover, this court in Camper v. Eanis, 35 Ill. App. 37, said:

"A wrongful intent is not an essential element of the conversion. It is enough in this action, that the rightful owner has been deprived of his property by some unauthorized act of another, assuming dominion or control over it. Boyce v. Brockway, 31 N. Y. 490. A very slight agency or interference will make one liable in trover. Farrar v. Chauffetete, 5 Denic, 527; see Follett v. Edwards, 30 Ill. App. 386, and cases there cited."

[fol. 59] It is apparent from the various agreements made between the parties that the plaintiff retained all title, dominion and control over this automobile, that the defendant had no right to sell it without plaintiff's consent, and that he was guilty of wrongful conversion when he did so. After defendant sold this automobile, he filed a voluntary petition in bankruptcy and scheduled the claim of plaintiff made herein as a debt owed to plaintiff. Defendant was discharged in the bankruptcy proceeding, and now insists that such discharge is a bar to this proceeding. In Lester v. Southern Security Co., 147 S. E. Rep. 529, the court said:

"A creditor having a debt secured by title to property, where his debtor is adjudged a voluntary bankrupt, can, if he does not prove his debt in the bankruptcy court, institute an action in trover for the recovery of such property, and is entitled to obtain a money judgment against his debtor for the value of the property sued for, as against the plea of discharge in bankruptcy.

This court holds that this claim against defendant was not affected by defendant's discharge in bankruptcy. The judgment is, therefore, affirmed.

Affirmed.

Wilson and Medel, JJ., concur.

[fol. 60] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 61] In Supreme Court of the United States, —— Term, A. D. 1934

[Title omitted]

Assignment of Errors

Now comes R. H. Davis, trading as Davis Motor Sales, the petitioner, and files this, his assignment of errors, complaining as follows:

1. The Appellate Court of Illinois erred in failing to hold that the claim of the respondent was a proveable and a dischargeable claim in bankruptcy and that since the respondent participated in the petitioner's bankruptcy proceeding, the petitioner was discharged from the respondent's claim upon receiving his discharge in bankruptcy.

[fol. 62] 2. The Appellate Court erred in failing to hold that since the petitioner was not guilty of any malice in disposing of the car in question, the petitioner was discharged from the claim of the respondent by virtue of Section 17 of the Bankruptcy Act or Section 35, Title 11 of Chapter 3 of Mason's United States Code Ann.

3. The Appellate Court erred in holding that the claim of the respondent was not affected by the petitioner's discharge in bankruptcy.

4. The Appellate Court erred in affirming the judgment of the trial court.

Respectfully submitted, Edward A. Zimmerman, Attorney for Petitioner.

[fol. 63] Supreme Court of the United States

Order Allowing Certiorari—Filed October 8, 1934

The petition herein for a writ of certiorari to the Appellate Court of the State of Illinois, First District, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied

the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,694. Illinois Appellate Court, First District. Term No. 68. R. H. Davis, trading as Davis Motor Sales, Petitioner, vs. Ætna Acceptance Company. Petition for a writ of certiorari and exhibit thereto. Filed May 26, 1934. File No. 68, O. T., 1934.

PETITION FOR A WRIT OF CERTIORARI

FILE COPY

MAY 2

CHARLES EL

IN THE

Supreme Court of the United States

October Term, A. D. 1934.

No. [redacted] 68

R. H. DAVIS trading as DAVIS MOTOR SALES,
Petitioner,

vs.

AETNA ACCEPTANCE COMPANY, a corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

EDWARD A. ZIMMERMAN,
Counsel for Petitioner.

HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO

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IN THE

SUPREME COURT OF THE UNITED STATES

R. H. DAVIS, trading as DAVIS MOTOR SALES,
Petitioner,

vs.

AETNA ACCEPTANCE COMPANY,
a corporation,
Respondent.

No.....

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court
of the United States:

Your petitioner, R. H. Davis, trading as Davis Motor Sales, respectfully represents and shows to this Honorable Court that he seeks a writ of certiorari to review a judgment of the Appellate Court of Illinois for the First District, affirming a judgment of the Circuit Court of Cook County, Illinois, in favor of Aetna Acceptance Company, a corporation, the respondent, the plaintiff in the trial court, in a suit in trover against the petitioner, the defendant in the trial court, for conversion of an automobile.

Statement of the matter involved.

The respondent brought a suit in the Circuit Court of Cook County, Illinois, in replevin against the petitioner to recover a certain Auburn automobile, but the automobile

not being recovered, the respondent, on December 24, 1929, filed a count in trover in the action, under the Illinois practice, alleging that the petitioner had wilfully, wrongfully, tortiously, and maliciously converted the chattel. (R. 1.) The petitioner thereupon filed a plea of the general issue and later a special plea, in which it averred that after the happening of the alleged grievances, the petitioner had been adjudicated a bankrupt by the District Court of the United States for the Northern District of Illinois, and that he had been discharged from all debts and claims provable against his estate, including the claim of the respondent based upon the aforesaid judgment. (R. 2.) The respondent joined issues on this special plea by filing a replication setting forth that the cause of action arose by reason of the wilful and malicious acts of the petitioner as well as by his fraud, misappropriation, embezzlement or defalcation; that the respondent was seized of title to the automobile in question under certain documents creating a method of financing the sale of automobiles known as the "floor plan," whereby respondent financed automobiles sold by petitioner, the respondent retaining title thereto as security for the payment of $1,181.37; that the petitioner held the automobile under an agreement to hold it as respondent's property and not to sell or dispose of it until respondent had been paid said amount; and that the petitioner, without the knowledge and consent of the respondent, sold and converted the automobile. (R. 2-3.)

The trial court found that while the petitioner was guilty of conversion of the automobile (R. 4) that he had not been actuated by any wilful, malicious or criminal intent in disposing of the property. (R. 4, 5.) Damages were assessed in favor of the respondent in the sum of $1,000 and the Court entered judgment on the findings. A writ

of error was prosecuted in the Appellate Court of Illinois for the First District to review this judgment, but the judgment of the trial court was affirmed.

The facts.

The petitioner, during the transactions herein mentioned, operated a retail automobile sales business in Oak Park, Illinois, and the respondent during said period conducted an automobile finance business for the purpose of financing retail automobile dealers in the purchase of automobiles.

The automobile hereinabove mentioned was purchased by the petitioner from a distributor and placed on petitioner's salesroom floor. In order to obtain this automobile, petitioner borrowed from respondent the sum of $1,181.87, (R. 10) being ninety per cent of the purchase price. To insure the re-payment of this amount, petitioner gave respondent his note payable in thirty days and a trust receipt acknowledging that title to the automobile was in respondent. Petitioner also agreed to hold the automobile for respondent and not to encumber or dispose of it without respondent's consent. Petitioner also gave respondent a chattel mortgage and bill of sale on the automobile wherein petitioner warranted title in himself.

The petitioner, having the automobile on his salesroom floor for thirty days and being unable to dispose of it, gave a new note, trust receipt, chattel mortgage and bill of sale to respondent, all of which were substituted for the instruments originally given. (R. 9-10.)

Prior to the above transactions the respondent had financed from twenty-eight to thirty-five wholesale automobile transactions for the petitioner. In each of these instances the petitioner had been permitted to display the

automobile on his salesroom floor, and upon making a sale to receive the purchase price and remit the amount of the loan to respondent. (R. 7.) In none of these transactions was a formal release of the automobile given or requested. (R. 13.)

It was stipulated at the trial that the automobile was sold in the regular course of petitioner's business and that there had been no concealment. (R. 5.) The evidence showed that immediately following the sale the petitioner notified respondent thereof and requested it to send him a statement of the amount of credit due him, so that a settlement of the accounts between the parties could be effected. (R. 11, 15.) The evidence also showed that the respondent then owed petitioner the sum of $452.10 (R. 11, 17-18), and the further sum of $768.40 on a judgment which petitioner had paid on the account of respondent. (R. 13, 16.) Upon receipt of notice of the sale, the respondent sent a collector to the petitioner who demanded payment of the money realized from the sale of the automobile, but there is no evidence that any demand for the automobile was ever made. No statement of credit due petitioner was ever presented, and the account was never settled.

Thereafter the respondent filed the replevin suit to recover possession of the automobile. Immediately following, the petitioner filed his voluntary petition in bankruptcy as above stated, wherein the respondent was scheduled as a creditor. (R. 14.) In addition to the usual notice to scheduled creditors in bankruptcy, the respondent had knowledge of the proceeding which it derived from conducting an unsuccessful defense to an application by the bankrupt for an order to restrain it from proceeding with the replevin suit. (R. 22-23.) After petitioner received his discharge in bankruptcy, the respondent proceeded with

its suit under the trover count, and the special plea of petitioner, as above stated, setting up his discharge and alleging that the claim having been a claim provable in bankruptcy and that the respondent having notice thereof, the claim was discharged.

The respondent contended at the trial that it had title to the car by virtue of the trust receipt and chattel mortgage hereinabove mentioned, and that therefore the petitioner had no authority to sell the automobile without its consent; and that by petitioner's act of selling the automobile, he had committed a wilful, malicious and tortious act, giving rise to a claim not dischargeable in bankruptcy.

The petitioner proved at the trial that he had in the same way sold twenty-eight to thirty-five automobiles which had been financed by the respondent in the same manner; that in each instance the documents had been returned to him by the respondent after the loan on the automobile previously sold had been repaid, and that therefore he had had implied authority to sell and dispose of the particular automobile in the manner that it was sold (R. 11, 23-24); that he did not remit the proceeds to the respondent because of the aforesaid credit; that on September 13, 1929, and after the automobile was sold, he had been adjudged a bankrupt; that later, on June 9, 1930, he had received his discharge in bankruptcy (R. 15-16); and that respondent participated in the bankruptcy proceedings, and that it had been restrained from prosecuting the replevin suit by an order of the bankruptcy court entered on September 27, 1929. (R. 22.) The trial court specifically found as a fact that petitioner had not been guilty of any wilful malice or criminal intent in disposing of and in selling the automobile.

The Appellate Court of Illinois for the First District held that although petitioner was not guilty of any malice in disposing of the car, that the judgment in trover should be sustained, and that the claim of the respondent had not been discharged by the bankruptcy.

Reasons relied on for the allowance of the writ.

1. The decision of the Appellate Court of Illinois for the First District in holding the above claim was not discharged by the bankruptcy of petitioner, is contrary to the plain meaning and intent of Section 17 of the Bankruptcy Act.

2. The determination of the questions of the application of the Bankruptcy Act to the particular matter in issue has never been decided by this Court and is of great importance to automobile dealers and finance companies throughout the United States.

3. The judgment of the Appellate Court is contrary to law and the decisions of this Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Appellate Court of Illinois for the First District, commanding that Court to certify and send to this Court for its review and determination a full and complete transcript of the record and of the proceedings in the cause entered on its docket, No. 36473, entitled Aetna Acceptance Company, a corporation, defendant in error, *versus* R. H. Davis, trading as Davis Motor Sales, plaintiff in error, and that the said judgment of the Appellate Court of Illinois for the First District, may be

reviewed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just.

And your petitioner will ever pray.

Respectfully submitted,

EDWARD A. ZIMMERMAN,
Counsel for said Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

R. H. DAVIS, trading as DAVIS MOTOR SALES,
Petitioner,

vs.

AETNA ACCEPTANCE COMPANY,
a corporation,
Respondent.

No.....

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

OPINION OF THE APPELLATE COURT OF ILLINOIS.

The judgment of the Circuit Court of Cook County, Illinois, was entered on May 12, 1932. (R. 30.) The opinion of the Appellate Court of Illinois for the First District, was filed on February 7, 1934, affirming the judgment of the trial court and is printed in the record at pages 34 to 38.

II.

STATEMENT OF JURISDICTION.

The opinion of the Appellate Court of Illinois for the First District was entered of record on February 7, 1934. A petition for rehearing was filed by the petitioner on February 17, 1934. Rule 13 of the Appellate Court of Illinois for the First District, provides that a petition for rehearing is timely if filed within ten days after the decision of the said Appellate Court is entered of record. (Appendix.) An order of the Appellate Court denying the petition for rehearing was entered on February 26, 1934, and the judgment of the Appellate Court did not become final until the petition for rehearing was denied. *People* v. *Gilbert*, 281 Ill. 619.

Petitioner filed a petition in the said Appellate Court for a certificate of importance and appeal on March 7, 1934, nine days after the judgment of the said Appellate Court became final. Rule 22 of the Appellate Court of Illinois for the First District provides that application for leave to appeal on grounds of importance must be filed within twenty days after judgment in the said Appellate Court. (Appendix.)

The amount of the judgment was $1,000. Under Paragraph 203, Chapter 110 of Cahill's Revised Statutes of Illinois for 1933, being Section 75 of the Illinois Civil Practice Act, the judgment of the Appellate Court was final and not reviewable by any other Court of the State of Illinois unless the branch of the Appellate Court that heard the case, granted leave to appeal to the Supreme Court of Illinois on the grounds of importance. When the Appellate Court denied the petition for an appeal on the grounds of importance, the petitioner had no recourse to any tribunal

of the State of Illinois. The Appellate Court of Illinois was the highest court of the State of Illinois in which a decision could be had.

The jurisdiction of the Supreme Court of the United States to hear this petition and to grant the writ of certiorari prayed for is supported by Section 237b of the Judicial Code as amended by the Act of February 13, 1925. Under this statute the Supreme Court has jurisdiction of this cause.

Mellon v. *O'Neil,* 275 U. S. 212.

Western Union Tel Co. v. *Priester,* 276 U. S. 252.

Ches. & O. Ry. Co. v. *Mihas,* 280 U. S. 102.

Minn. St. P. & S. S. M. Ry. Co. v. *Rock,* 278 U. S. 593.

Central New Eng. Ry. Co. v. *Boston A. R. Co.,* 278 U. S. 596.

III.

STATEMENT OF CASE.

A full statement of the case is set forth in the petition.

IV.

SPECIFICATION OF ERRORS.

The Appellate Court of Illinois for the First District, erred:

1. In holding that the claim of the respondent was a claim not provable in bankruptcy, and that the petitioner was not discharged therefrom by the proceeding in bankruptcy.

2. In sustaining the judgment of the trial court.

V.

ARGUMENT.

The Appellate Court in sustaining the judgment of the trial court denied to the petitioner the rights accruing to him by virtue of his discharge in the bankruptcy proceeding had in conformity with the Bankruptcy Act.

The plea of the petitioner to the trover count created the issues whether:

1. The claim of the respondent was a claim provable in bankruptcy;

2. The petitioner was released from the claim by his discharge in the bankruptcy proceeding.

Section 63 of the Bankruptcy Act, (United States Code, Title 11, Section 103a):

> "Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability as evidenced by a judgment or an instrument in writing absolutely owing at the time of the filing of the petition against him, whether then payable or not. * * * (4) founded upon an open account or upon a contract expressed or implied. * * *"

The claim of the respondent was a liquidated claim evidenced by the note of petitioner and, therefore, was a claim provable in bankruptcy. The fact that the respondent could elect to recover from petitioner in a tort action does not change the character of the claim from one provable in bankruptcy to a claim not provable in bankruptcy. In Sec-

tion 767 of Vol. 2 of *Remington on Bankruptcy* (3d ed.), the author states:

> "However, in cases where tort may be waived and suit be brought in contract, the claim may be proved in bankruptcy."
>
> *Shall* v. *Camors,* 251 U. S. 239.
> *Crawford* v. *Burke,* 195 U. S. 176.
> *Clarke* v. *Rodgers,* 183 Fed. 518, aff'd in 228 U. S. 534.
> *Tindle* v. *Birkett,* 205 U. S. 183.

In Illinois it is well settled that although the act of a party converting the goods of another may be tortious, the owner may waive the tort and sue the wrongdoer in assumpsit on the common counts for money had and received or for goods sold and delivered.

> *T. W. & W. R. Co.* v. *Chew,* 67 Ill. 378.
> *DeClercq* v. *Mungin,* 46 Ill. 112.
> *City of Elgin* v. *Joslyn,* 136 Ill. 525.
> *Cushing* v. *Hayes,* 46 Ill. 145.
> *Donovan* v. *Purtell,* 119 Ill. App. 116, aff'd. 216 Ill. 629.

Under the foregoing authorities, the respondent's claim was provable in the petitioner's bankruptcy proceeding.

The second issue raised by the special plea was whether the petitioner was released from the claim of the respondent by the discharge of petitioner in the bankruptcy proceeding. The respondent's replication alleges that the act of the petitioner in selling the automobile was a malicious and wilful injury to the respondent and amounted to fraud, misappropriation, embezzlement and defalcation by the petitioner while acting in a fiduciary capacity. Respond-

ent's replication was predicated on Section 17 of the Bankruptcy Act (United States Code, Title 11, Section 35) which provides:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (2) are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

The trial court specifically found that the petitioner had not been guilty of any malicious, willful or criminal intent in selling the automobile. (R. 4, 5.) The parties to the suit stipulated that the automobile was sold in the regular course of business and that there had been no concealment of the sale. (R. 5.) By affirming the judgment without making any special findings of fact, the Appellate Court affirmed the findings of the trial court.

Knight v. *Seney,* 290 Ill. 11, 16.
Kee & Chapell Co. v. *Pennsylvania Co.,* 291 Ill. 248.

Since the evidence showed, and the trial court found, that the petitioner had not been guilty of any malice in disposing of the automobile and since the respondent was scheduled as a creditor and had knowledge of the bankruptcy proceedings, the respondent's claim does not come within the exceptions noted in clauses 2 and 4 of the above Section 17. It has been repeatedly held that in order to bring a claim

within the exception noted in clause 2 of the above Section 17 of the Bankruptcy Act, there must be a showing not only of a conversion but of a wilful and malicious conversion.

In Re Northrup, 265 Fed. 420, 421.
McIntyre v. *Kavanaugh,* 242 U. S. 138.
In Re Burchfield, 31 Fed.(2d) 118.
Walker Bros v. *Capital Grocery Co.,* 28 Ga. App. 531.
Wood v. *Fisk,* 215 N. Y. 233.
Andrews v. *Dresser,* 214 N. Y. 671.
Ulner v. *Doran,* 167 App. Div. (N. Y.) 259, 261.

Not every conversion constitutes a wilful and malicious injury. A malicious conversion has been defined as:

> "A wilful disregard of what one knows to be his duty and an act which is against good morals and wrongful in and of itself, which necessarily causes injury and is done intentionally."

Tinker v. *Colwell,* 193 U. S. 473, 487.
McIntyre v. *Kavanaugh,* 242 U. S. 138, 141.

The claim of the respondent does not come within the exception noted in clause 4 of the above Section 17. At the time the petitioner secured the money from the respondent, he executed a note and, as security for the payment of the note, executed a trust receipt acknowledging receipt of the automobile from the respondent and agreeing to hold the same as the property of the respondent. At the same time petitioner also executed a chattel mortgage to the respondent covering the automobile, and a bill of sale from the petitioner to the respondent acknowledging title in the petitioner.

The note was not paid when due and thereupon the petitioner executed anew, a note, trust receipt, chattel mort-

gage, and bill of sale. It has recently been held by the Supreme Court of Illinois that a contract of conditional sale which retained title in the vendor and a chattel mortgage on the same property could not both be effective at the same time, and that where a vendor who had retained title under a conditional sales contract accepted a chattel mortgage by a vendee, covering the same property, the chattel mortgage extinguished the conditional sales contract, and that the title of the vendee thereby became absolute, subject to the lien of the chattel mortgage.

Maxcy-Barton Organ Co. v. *Glen Corp.*, 355 Ill. 228, 242.

To the same effect are:

Premier Potter Printing Press Co. v. *Fuller*, 294 Fed. 451.

Nordone v. *Austin Drainage Excavator Co.*, 185 N. Y. S. (App. Div.) 309.

Buckeye Cotton Oil Co. v. *Westerfield*, 186 Ark. 505.

It has been held that where a conditional sales contract and a chattel mortgage were executed simultaneously to secure the purchase price of an article, the provisions of the conditional sales contract which retained title in the vendor were inconsistent with the provisions of a chattel mortgage and that any doubt as to what was intended by the parties would be resolved in favor of the presumption that an absolute sale was intended and that both instruments were intended as a chattel mortgage.

International Harvester Co. v. *Threlkeld*, 226 Mo. App. 600.

Aultman & Co. v. *Silha*, 85 Wis. 359.

In Illinois a bill of sale given as security for a debt is in effect a chattel mortgage. *Whittemore* v. *Fisher,* 132 Ill. 243. The acceptance by the respondent of a bill of sale in which the petitioner acknowledged and warranted that he was the lawful owner of the automobile, and which, together with the chattel mortgage, must be taken as a chattel mortgage on the automobile, estopped the respondent from denying that title and ownership of the automobile was in the petitioner.

Maxcy-Barton Organ Co. v. *Glen Corp.,* 355 Ill. 228, 242.
Trustees of Schools v. *Wilson,* 215 Ill. 352.
Second Nat. Bank v. *Gilbert,* 174 Ill. 485.
Jeffery v. *Robbins,* 167 Ill. 375.

Under the above decisions, the respondent was merely a creditor of the petitioner and there existed no fiduciary relationship between the parties. Section 17 (4) of the Bankruptcy Act does not refer nor apply to the relationship existing between a debtor and his creditor.

Upshur v. *Briscoe,* 138 U. S. 365.
Hennequin v. *Clews,* 111 U. S. 676.
Palmer v. *Hussey,* 119 U. S. 96.
Cronan v. *Cotting,* 104 Mass. 245.

No fiduciary relationship existed between the parties, hence Section 17 (4) of the Bankruptcy Act has no application to respondent's claim.

By the decisions of the Supreme Court in *Crawford* v. *Burke,* 195 U. S. 176, and *Tindle* v. *Birkett,* 205 U. S. 183, it is now definitely settled that the words "while acting in a fiduciary capacity" limit and qualify each of the words "fraud, embezzlement and misappropriation as well as the

word defalcation'' mentioned in Section 17 (4) of the Bankruptcy Act.

The Appellate Court of Illinois for the First District, relied on the case of *Lester* v. *Southern Security Co.*, 168 Ga. 307. The Court there in rendering its decision applied the same rule laid down in the case of *Citizens Bank* v. *Mullis,* 161 Ga. 371, which presented a similar state of facts as that in the former case. In referring to the latter case, Mr. Remington in his work on Bankruptcy, (Vol. 7, 3rd ed., Sec. 3552, page 202 of the supplement) states:

> ''The dissenting opinion represents the better reasoning and the court's decision is wrong.''

In conclusion we urge that since the claim of the respondent was a claim provable in a bankruptcy proceeding, and since the respondent had the opportunity to assert the said claim in the petitioner's bankruptcy proceeding, and since the trial court found that the petitioner was not guilty of any malicious intent in disposing of the automobile, the exceptions noted by Section 17 (2) and (4) of the Bankruptcy Act have no application to the respondent's claim, and therefore that the Appellate Court erred in sustaining the judgment of the trial court; that said decision is contrary to the plain meaning and intent of Section 17 of the Bankruptcy Act and that the said Appellate Court misapplied the provisions of that section in determining this cause.

We therefore respectfully submit that the petition for certiorari should be allowed and that the writ prayed for should be granted.

Respectfully submitted,

EDWARD A. ZIMMERMAN,
Counsel for Petitioner.

APPENDIX.

Rules of the Appellate Court of Illinois, First District.

Rule 13.

PETITION FOR REHEARING.

Within ten days after a decision is entered of record the party desiring a rehearing shall give notice in writing to the opposite party or his attorney of his intention to make application therefor, and shall within said ten days file with the clerk of this court a copy of such notice, with proof of due service thereof and seven printed copies of the petition for a rehearing. Cover color to be light green. Such petition shall state concisely the points supposed to have been overlooked or misapprehended by the court, with proper reference to the particular portion of the original abstract and brief relied upon. In no case will any argument be permitted in support of such petition. This rule will be strictly enforced, and any petition in violation thereof will be stricken from the files. If a rehearing be granted, the case will be reconsidered upon the record, abstracts, original briefs, petition and any answer thereto of which seven printed copies shall have been filed with the clerk of the court within ten days after the order granting a rehearing is entered of record.

Rule 22.

CERTIFICATE OF IMPORTANCE.

(1) When the Appellate Court has granted leave to appeal to the Supreme Court on the ground of importance, the clerk of the Appellate Court shall transmit to the clerk of

the Supreme Court the same record which was transmitted to the Appellate Court, with a certified copy of the record of the Appellate Court appended thereto, and the certificate of importance of the Appellate Court. Applications for leave to appeal on the ground of importance shall be made by printed or typewritten petitions clearly setting forth the grounds relied upon by the party asking the same, and must be presented to the court, if in session, or to a majority of the judges, if in vacation, within twenty days after entry of judgment in the Appellate Court. The Appellate Court may require bond as a condition of granting leave to appeal on the ground of importance.